IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5295 OF 2003

M/s.Malpani Infertility Clinic Pvt.Ltd.
& others. .. .. .. Petitioners

v/s.

Appropriate Authority
PNDT Act & others. .. .. Respondents

Mr.Anil V. Anturkar for Petitioners.

Mr.A.Y.Sakhare with Mr.M.D.Patil for Res.No.1.

Mrs.J.S. Pawar, Additional Govt. Pleader for Res.No.2.

CORAM : H.L. GOKHALE &
SMT.NISHITA MHATRE, JJ.
DATED : 17th September 2004

ORAL ORDER : (Per H.L. Gokhale, J.)

1. Heard Mr.Anturkar for the Petitioners. Mr.Sakhare Senior Advocate with Mr.Patil appears for Respondent No.1 and Mrs.Pawar, Additional Government Pleader for Respondent No.2.

2. This Petition seeks to challenge the order dated 7th August 2003 issued by Respondent No.1 under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, "the PNDT

Act) which suspends the registration of the 1st Petitioner's Diagnostic Centre under the PNDT Act. This is an Act which has been passed by the Parliament to deal with the problem of pre-natal sex determination leading to female foeticide. A Public Interest Petition bearing Writ Petition (Civil) No.301 of 2001 was filed in the Apex Court by an N.G.O. CEHAT (Centre for Enquiry into Health and Allied Themes) wherein a grievance was made that inspite of passing the said Act, the activities, which are prohibited under this Act, are going on. The Petitioners herein intervened in that matter inasmuch as they were carrying on a Centre called as a Diagnostic Centre, whose activities could be said to be prohibited under the said Act. They joined as Respondent No.38 in the proceedings before the Apex Court. In the Apex Court, in fact, the Petitioners filed an affidavit and defended the sex determination test on the ground of "family balancing" by filing an affidavit, though subsequently another affidavit was filed wherein an apology was tendered and it was stated that only wrong committed by them was to continue the advertisement of such an activity on web site. The Apex Court gave appropriate directions for the implementation of the Act and thereby the Petition was disposed of.

3. It is material to note that the above-referred affidavit containing apology was filed in the Apex Court in July 2003. As a part of the implementation of the directions of the Supreme Court, the Respondents started the prosecution of the Petitioner under Section 22(3) of the said Act on 22nd July 2003 and then came the impugned order, which is issued by the appropriate Authority on 7th August 2003. This order in the reference column refers to two items viz. (i) Case No.34/S/ of 2003 filed against the Petitioners in the Court of Metropolitan Magistrate, 37th Court, Esplanade, Mumbai and (ii) letter from the Additional Director, Health Services. Thereafter, the order states in second paragraph as follows:-

> "As per the reference given above you are hereby informed that said Registration is suspended / cancelled with effect from 07.08.2003 in the Public interest till further orders from the court, which please note. "

The registration mentioned therein is the registration of the Petitioners to carry on certain activities as permitted under the said Act for a period of five years and which is issued to

the Petitioners sometimes in January 2002.

4. Mr.Anturkar, learned Counsel appearing for the Petitioners, submitted that this order was uncalled for. He further submitted that the only section to which this order can be related, is Section 20 of the said Act. Sub-section (1) of Section 20 of the said Act requires a show cause notice to be given to the person concerned or to the Centre concerned on a complaint being received or on a suo motu basis by the appropriate Authority. Thereafter, under sub-section (2) of Section 20 of the said Act, a hearing is contemplated and thereafter if the Authority is satisfied that there is a breach of the provisions of this Act or the rules that it may, without prejudice to any criminal action, suspend the registration. Mr.Anturkar submitted that, in the present case, no notice has been given to the Petitioners nor has there been any hearing and, therefore, the impugned order is bad in law. He further submitted that, according to the Petitioners, they are no longer carrying on the disputed activities and the only mistake committed by them was not to update the web site, which, according to him, has now been done.

5. Mr.Sakhare, learned senior Counsel

appearing for Respondent No.1 and Mrs.Pawar, learned Additional Government Pleader appearing for Respondent No.2, submitted that the Petition ought not to be entertained for the reason that an Appeal is available under Section 21 of the said Act to the Appellate Authority. As far as this submission is concerned, Mr.Anturkar submitted that against the order of the appropriate Authority, an Appeal is available to the Additional Director of Health Services and since it is that officer, who has written a letter leading to the suspension, the Appeal will be meaningless. It was suggested to Mr.Anturkar that an Appeal may be preferred to the Principal Secretary of the Health Department since under Section 21 of the said Act, the Appeal lies to the State Government. Mr.Anturkar, however, submitted that the then Principal Secretary one Mr.Manmohan Singh had written a letter in July 2003 taking certain position on this controversy. He, therefore, submitted that it will be difficult to expect a fair hearing from this Secretary. Ms.Pawar, learned Additional Government Pleader appearing for Respondent No.2, pointed out that Mr.Manmohan Singh is now no longer the Principal Secretary in the Health Department and the concerned Principal Secretary is one Mr.Navin Kumar. However, inspite of this, Mr.Anturkar

submitted that it would be better that this Court itself may go into the aspect of this matter.

6. Mr.Sakhare, learned senior Counsel appearing for Respondent No.1, submitted that an Appeal having been provided, it ought to be first exhausted. As far as this submission is concerned, undoubtedly there is some merit therein. However, the principle of exhaustion of internal remedies is a rule of self restriction as far as the powers of the High Court are concerned. That being so, if a party feels that there is no use in resorting to the remedy inasmuch as it is like going from Caesar to Caesar and if the party wants the grievance to be redressed in the High Court, the High Court cannot prevent the party from doing so.

7. In view of this position, we have heard Mr.Anturkar. As stated above, he has referred to the provisions of sub-sections (1) and (2) of Section 20. As against this, it is material to note that sub-section (3) of Section 20, provides for a suspension of the registration and that power can be exercised notwithstanding anything contained in sub-sections (1) and (2) for the reasons to be recorded in writing. Mr.Anturkar submitted that even if this sub-section (3) is

pressed into service, that sub-section requires reasons to be given in writing. In our view, there is a clear reference to the prosecution lodged against the Petitioners in the reference clause. The Petitioners very much knew that a Public Interest Petition was filed in the Apex Court. They have filed an affidavit in that proceedings. Thereafter, they had tendered an apology as stated above in July 2003. Thereafter on 22nd July 2003, they knew that they were prosecuted. This being the position, if the appropriate Authority refers to that prosecution and issues an order of suspension, in our view, there is a sufficient mention of the reasons for the Authority which have led it to take the action.

8. Mr.Anturkar submitted that in the affidavit filed by the Authority, they have stated that this is an action of cancellation. Inasmuch as sub-section (3) of Section 20 does not provide for a cancellation, this order cannot be considered as an order of cancellation. It can only be treated as an order of suspension which will mean suspension till the hearing and disposal of the prosecution which has been mentioned in the order. In our view, such an action has to be permitted to the Authority concerned. If the

Authority has some material before it, which, prima facie, it had, at the relevant time, it ought to have such a power to suspend the activities of such a nature. If such power is not read into the section, the provisions of a welfare enactment will be rendered nugatory. It is only a particular kind of activity which has been stopped and two machines have been seized by the Authority concerned. The 2nd and 3rd Petitioners are Gynaecologists and their practice as Gynaecologists is not prevented in any manner whatsoever. In a situation like this, where there is a conflict of private interest to carry on a particular activity which the public Authority considers as damaging to the social interests, surely, the power under the Statute has to be read as an enabling power. In the instant case, in our view, sub-section (3) of Section 20 provides an adequate power to the Authority concerned to suspend the licence.

9. Mr.Sakhare appearing for Respondent No.1 and Ms.Pawar, Additional Government Pleader for Respondent No.2, have referred to two affidavits filed by the Respondents' officers, which mention violation of various rules including Rule 6(2) 4(i)(ii) and 9(i) of the Rules framed under the said Act as well as Section 23 (i) which empowers

the prosecution. They drew our attention to a statement of one of the patients attending the Clinic pointing out the purpose for which she went there and the assurance given to her. Inasmuch as such prosecution has been lodged, if the Public Authority forms an opinion that pending that prosecution, a particular activity should be suspended, we do not think that there is any error on its part and it is not necessary that when the reasons are required to be given in writing, there ought to be a detailed discussion. A reference to the prosecution is sufficient as the reason for the action and the same is provided in the order.

10. In the circumstances, there is no substance in the Petition and the same is dismissed. The interim order passed earlier is vacated. Mr.Anturkar applies for extension of the stay for a period of four weeks. However, in view of the circumstances leading to the impugned order, we are not inclined to extend the stay.

11. Authenticated copy of this order be made available to the parties.

__ _____**(H.L. GOKHALE, J.)**

(SMT.NISHITA MHATRE, J.)